Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

Mary Elizabeth Hightower,
Petitioner

v.

Continental Cablevision of Jacksonville, Inc.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED FOR REVIEW

Whether as a matter of law an employer's offer of a part time position with reduced benefits to the disabled employee without engaging in any interactive process is a "reasonable accommodation" under the Americans with Disabilities Act, when the employee is a victim of multiple sclerosis, who was already working a full time position with full benefits and repeatedly requested only a reduction in hours?

PARTIES TO THE PROCEEDING

The petitioner is Mary Elizabeth Hightower.

The respondent is Continental Cablevision of Jacksonville, Inc., now known as MediaOne of Greater Florida, Inc. AT&T Corp. wholly owns MediaOne of Greater Florida, Inc. AT&T Corp is a publicly traded corporation that is a parent to a number of subsidiaries, some or all of which are wholly owned.

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OPINIONS BELOW

On March 5, 2001, the United States Court of Appeals for the Eleventh Circuit affirmed the grant of summary judgment in favor of Continental Cablevision of Jacksonville, Inc. ("Continental Cablevision") by the United States District Court for the Middle District of Florida, Jacksonville Division. A copy of the unpublished opinion of the Eleventh Circuit (App. A) is contained in the Appendix. On April 10, 2001, the Eleventh Circuit denied Mary Hightower's petition for panel rehearing. A copy of the denial of rehearing of the Eleventh Circuit (App. C) is contained in the Appendix.

On April 2, 1998, the United States District Court for the Middle District of Florida in an unpublished order granted summary judgment in Continental Cablevision's favor and directed entry of judgment in its favor. Copies of the summary judgment order (App. B) and of the judgment (App. D) are contained in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1), to review by certiorari the opinion of the United States Court of Appeals for the Eleventh Circuit rendered on April 10, 2001.

STATUTORY PROVISION

The Americans with Disabilities Act of 1990 ("ADA") prohibits employers from discriminating against a disabled employee by:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A).

STATEMENT OF THE CASE

On April 2, 1998, the United States District Court for the Middle District of Florida granted summary judgment in favor of the defendant, Continental Cablevision, with respect to Mary Hightower's complaint under the ADA. Mary Hightower appealed to the United States Court of Appeals for the Eleventh Circuit, which held oral argument on February 24, 1999. Over two years later, on March 5, 2001, the Eleventh Circuit affirmed the grant of summary judgment and found that as a matter of law Mary Hightower had been offered a reasonable accommodation by Continental Cablevision and that the accommodation requested by Mary Hightower was not reasonable. On April 10, 2001, the Eleventh Circuit denied Mary Hightower's petition for panel rehearing.

Continental Cablevision employed Mary Hightower at the time neurologists on staff at the University of Florida's teaching hospital in Jacksonville diagnosed her as suffering from multiple sclerosis, a progressive disease. Mary Hightower's primary neurologist, Dr. Hartley, wrote letters to Continental Cablevision requesting reasonable accommodations for her job, including one on March 30,

1995 that she be "reassigned to a part-time position." Almost a year later, in February 1996, Dr. Hartley, again requested a "reasonable accommodation" for Mary Hightower, and informed Continental Cablevision in writing that "medication along with rest does help to control the disease."

After Mary Hightower missed a week of work as a customer service representative in April 1996, Continental Cablevision counseled her. Mary Hightower responded in writing by requesting an accommodation of a five-day week, six-hour day work schedule. Continental Cablevision did not respond to the request. Previously, Continental Cablevision had offered Mary Hightower part-time employment, which would have resulted in a loss of significant benefits to her. Mary Hightower described the position of Continental Cablevision in her contemporaneous written response: "I have requested from H/R-Management for [a] reasonable accommodation 6 hr shift which I felt would be very helpful with my attendance, only to find that they can only assist me with a 25-29 hr. part time shift which would remove my most vital benefits. I would like to look further into this matter with H/R or whomever can help me without removing full-time hrs or benefits."

Continental Cablevision never engaged in any interactive process with Mary Hightower and offered her only a part-time position with reduced benefits. On September 17, 1997, Gloria Jean Davis, a human resource generalist and the corporate representative of Continental Cablevision, was deposed. Davis testified concerning the offer of part-time employment to Mary Hightower as follows:

> Q. Were you personally involved in any discussions where Ms. Hightower was present

where the subject of her working part time came up?
A. You said was I present?
Q. Physically present where you were there. Firsthand knowledge, I'm asking about.
A. Yes.
Q. Okay. What do you recall was discussed?
Ms. Ullner [Continental's counsel]: Objection.
A. I recall discussing with the supervisor at the time that the schedule available, what we had available to accommodate Ms. Hightower would have been a 25 to 29 per hour workweek.
Q. Anything - - go ahead.
A. And that's basically it. That's what we had available. And that's what we would be able to offer as an accommodation.
Q. What was your understanding as to the availability of benefits for someone that worked 25 to 29 hours?
A. At the time, part time - - 25 to 29 hours, was considered part-time employment. An employee would not have health care coverage, health care, vision or dental coverage as a part-time employee. The employee would still have 401(k) benefits, free cable service and other paid benefits that they chose.
Q. If one worked 30 hours a week, what benefits would be available?
A. The same benefits I mentioned previously with addition to health insurance, dental and vision.

Deposition of Gloria Jean Davis at 117 to 118 (Sept. 17, 1997) (R1-23-117 to 118)

Mary Hightower could not accept Continental Cablevision's offer of a twenty-five to twenty-nine hour workweek part-time position with reduced benefits. Instead, Mary Hightower continued to try to work a forty-hour week pursuant to her assigned schedule. However, Mary Hightower discussed the subject of working reduced hours with the customer service manager of Continental Cablevision, who was asked in deposition "whether the company tried to work with Ms. Hightower with her disability?" to which he responded, "I couldn't speak to specifics." Continental Cablevision never responded to Mary Hightower's request for a reduced thirty-hour workweek that would have enabled her to continue in her full time position with full benefits.

On July 8, 1996, Dr. Hartley sent a note to Continental Cablevision that Mary Hightower was scheduled for an MRI on Friday afternoon, July 12, 1996. The following Monday morning, July 15, 1996, Continental Cablevision placed Mary Hightower on a mandatory development for the next thirty days. Mary Hightower responded in writing stating that in "the past I have not been given any reasonable avenues that would help in my attendance or in any other way without altering my entire life along with my medication to remain functional at work." Mary Hightower successfully completed the thirty-day mandatory development but then missed work in the beginning of September 1996. On September 17, 1996, Mary Hightower refused Continental Cablevision's request that she sign a release in return for six months current health insurance premiums and three weeks pay. Two days later, Continental Cablevision terminated her employment.

After receiving a right to sue letter, on April 8, 1997, Mary Hightower filed suit in the Middle District of Florida, Jacksonville Division. On April 2, 1998, a few days before

Mary Hightower's case was scheduled for jury trial, the district court entered summary judgment in Continental Cablevision's favor finding in part that "[t]here is no duty on the part of the Defendant to create a position for the Plaintiff. Once Defendant offered Plaintiff the reasonable accommodation of a part time job and it was rejected, Defendant discharged its duty to further accommodate Plaintiff and Plaintiff cannot demonstrate that she was otherwise qualified." The Eleventh Circuit in its March 5, 2001 decision agreed and found that "[t]he accommodation offered, a reduced work schedule of 25-29 hours per week, was reasonable. The ADA, 42 U.S.C. § 12111(9)), provides that 'part-time or modified work schedules' are reasonable accommodations, exactly what Hightower's physician opined would be reasonable." The Eleventh Circuit then found that the accommodation requested by Mary Hightower, the continuation of her full time position with full benefits but with a reduced thirty-hour workweek, was not reasonable.

In its decision, the Eleventh Circuit did recognize: "Continental's management personnel admitted that immediate supervisors have the discretion to schedule employees for work weeks from as little as ten (10) hours up to thirty (30) hours and that there are over seventeen (17) different shifts in the operations."

REASONS TO GRANT THE WRIT OF CERTIORARI

On April 16, 2001 this Court Granted Certiorari on the Ninth Circuit's Decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (2000) (en banc) on the Issue of whether an Employer is Required to Assign a Disabled Employee to a Different Position as a "reasonable accommodation" under the ADA.

On April 16, 2001, a few days after the Eleventh Circuit denied Mary Hightower's petition for panel rehearing, this Court granted certiorari on the Ninth Circuit's decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (2000) (en banc) on the issue of whether an employer is required to assign a disabled employee to a different position as a "reasonable accommodation" under the ADA.

In all probability, the Court will be addressing the proper interpretation of "reasonable accommodation," especially in light of EEOC regulations on the interactive process. The Court may also address the evidentiary standard for a jury determination on whether an accommodation is a "reasonable accommodation."

The evidence necessary to go to the jury on the issue of a "reasonable accommodation" is of particular import in ADA cases because this Court has very recently confirmed in *PGA Tour, Inc. v. Martin*, __ U.S. __, No. 00-24 (May 29, 2001) that "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."

Furthermore, the United States Court of Appeals for the Second Circuit has recently held that "Reassignment does

not constitute reasonable accommodation, therefore, where a position comparable to the employee's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority or other advantages in her former job." *Norville v. Staten Island University Hospital*, 196 F.3d 89, 99 (2nd Cir. 1999). The Second Circuit went on to summarize that "the law is clear that an offer of an inferior position does not constitute a reasonable accommodation where a position with salary and benefits comparable to those of the employee's former job is available." *Id.* at 100. The Second Circuit found that it was a jury issue concerning whether an offer of "part-time work [that] would have resulted in a significant cut in [the plaintiff] Norville's salary and benefits," was not comparable and that the district "court should have instructed the jury that an offer of an inferior position does not qualify as a reasonable accommodation when a comparable position is available, and charged the jury with determining whether the positions [the defendant hospital] SIUH proposed were in fact inferior and whether a comparable position was vacant." *Id.*

Even more recently, the United States Court of Appeals for the Sixth Circuit has held that an employee's refusal to accept an employer's offer of a reassignment position with a cut in pay does not automatically preclude an ADA claim. "The [EEOC's ADA] regulations instruct that employers 'should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time,' and should only reassign an individual to a lower graded position if the individual cannot be accommodated in an equivalent position. 29 C.F.R. pt. 1630, App. § 1630.2(o). Therefore, we hold that Hoskins's refusal to accept one of the lower graded positions does not automatically preclude her from being considered a 'qualified

individual with a disability.' Instead, if Hoskins can demonstrate that an equivalent position was open for which she was otherwise qualified, then she will prevail on her claim." *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719, 728 n. 3 (6th Cir. 2000).

For these reasons, Mary Hightower requests that the Court consider her petition for writ of certiorari in light of the pendency of its decision in *US Airways, Inc. v. Barnett*, No. 00-1250. After *US Airways, Inc. v. Barnett* is decided, the Court may deem it appropriate to grant Mary Hightower's petition and vacate and remand to the Eleventh Circuit for further consideration in light of the Court's decision.

Respectfully submitted,

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Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2695
Non-Argument Calendar

D.C. Docket No. 97-00348-CV-J-20C

MARY ELEIZABETH HIGTOWER,

Plaintiff-Appellant,

versus

CONTINENTAL CABLEVISION OF JACKSONVILLE,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(March 5, 2001)

BEFORE: MARCUS and HILL, Circuit Judges and FERGUSON*, District Judge.

*Honorable Wilkie D. Ferguson, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

This appeal is brought from the district court's grant of summary judgment in favor of the employer. The district court found that the plaintiff failed to present a *prima facie* case under the Americans with Disabilities Act, 42 U.S.C §

12101 *et seq.* ("ADA"), because (1) the plaintiff's requested accommodation, retaining full fringe benefits while working part-time, was not reasonable; and (2) the defendant's offered accommodation, a part-time position, was reasonable. We affirm.

I. BACKGROUND

On April 19, 1993 Mary Hightower ("Hightower"), the plaintiff, was hired by Continental Cablevision of Jacksonville, Inc. ("Continental"), the defendant, as a sales representative. In April of 1994 she was diagnosed with Multiple Sclerosis and Continental was promptly informed. In 1995 Hightower's position as a sales representative was eliminated and she was transferred to the position of customer service representative. Her new job responsibilities included answering customer telephone inquiries regarding sales, service and billing.

Throughout her course of treatment Hightower's physician, Dr Hartley, communicated with Continental several times. In an August 16, 1994 note he stated "[s]he has recently been diagnosed as having Multiple Sclerosis. At this time the disease is producing relatively mild symptoms although she does have chronic, daily headaches. She also reports some side effects from her medication. At times she may have to miss work because of these conditions."

As predicted by Dr. Hartley, Hightower began to miss work because of the effects of the disease. Once again, on February 12, 1996, the physician wrote to Continental's Manager of Human Resources describing Hightower's impairment and advising Continental of her conditional ability to continue employment:

[Hightower] can return to her job and assume normal

> duties, although sometimes she may experience severe headaches and chronic fatigue and may have to miss some work. Her jobs consists of mainly sitting, telephone work, occasionally working within the department. She cannot on a continuous basis climb up and down stairs, [perform] excessive walking or heavy lifting, dust or fumes.... She would like to continue to work her job hut must have some reasonable accommodations from her job.

In another letter Dr. Hartley gave an opinion of a reasonable accommodation stating "[i]t would be helpful if she could be reassigned to a part-time position."

After Hightower missed a week of work in April of 1996, she was counseled by Continental. She responded with a request for an accommodation of a five-day week, six-hour day work schedule (i.e, 30 hours per week) which, she contends, would permit her to retain full-time employment status without a loss of benefits. Continental offered, instead, a 25-29 hour part-time position and further asserted that no full-lime thirty (30) hour position with full benefits existed. Hightower testified that Continental, by terms of its employee handbook, provides benefits in regular part-time employees on a prorated basis. Continental, contended, and Hightower did not dispute, that the offer of part-time employment included the value of the reduced benefits. Continental further argued that Hightower was not seeking benefits but instead wanted "extra cash" because her compensation included the value of fringe benefits. The arrangement was pursuant to her request as she already had health care coverage under her husband's employment package.

Continental's management personnel admitted that immediate supervisors have the discretion to schedule

employees for work weeks from as little as ten (10) hours up to thirty (30) hours and that there are over seventeen (17) different shifts in the operations. Hightower has presented no evidence, however, that employees who work less than forty-hours are provided full health care benefits. She admitted that she was unaware of the existence of a part-time position which paid full-time benefits,

By a note dated July 8, 1996, found in Hightower's personnel file, Dr. Hartley informed Continental that his patient was scheduled for an MRI on Friday afternoon, July 12, 1996. On the following Monday morning, July 15, 1996, Continental placed Hightower on a "mandatory development" warning for a period of thirty days because of excessive absences from work. She wrote Continental apologizing for the absences which were necessitated by her impairment, and pleading for accommodations which would "help in [her] attendance" and allow her to remain functional at work.

On September 3, 1996, Hightower called in sick to her immediate supervisor. On or about September 17, 1996, Susan Richards, Continental's Manager of Human Resources, met with Hightower and asked her to sign a release of her ADA claim in return for three (3) weeks pay and six (6) months of current health insurance premiums. Hightower refused Continental's offer of a part-time position and would not sign the release. She was terminated two (2) days later.

On appeal, Hightower contends that (1) the part-time position offered as an accommodation for her disability, which excluded fringe benefits, was unreasonable under the Act and (2) occasional absences from her clerical position caused by a disability for which she sought a reasonable accommodation did not render her unqualified for the

position. It is also contended in this appeal that Continental's termination of Hightower's employment was in retaliation for her refusal to execute a release of her ADA claim in exchange for a payment of cash equal to the value of six (6) months of fringe benefits.

II. DISCUSSION

Standard of Review

This court reviews a district court's decision to grant summary judgment *de novo*, "construing all evidence in the light most favorable to the non-moving party." Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000). "Summary judgment is only proper when there are no genuine issues of material fact." Id. "An issue of fact is material and genuine if a rational fact finder could find for the nonmoving party on a fact necessary to establish an element of the claim under applicable substantive law." Ross Neely Sys., Inc. v. Occidental Fire.& Cas. Co. of N.C., 196 F.3d 1347. 1350 (11th Cir. 1999)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242. 248 (1986)). The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. See Celotex Corp. v. Catrett, 477 US. 317, 323 (1996).

Plaintiffs *Prima Facie* Case

Under the ADAA *prima facie* case of employment discrimination under the ADA is established on a showing that the plaintiff (1) has a disability; (2) is qualified, with or without reasonable accommodations, to perform the essential functions of her job; (3) identified a reasonable accommodation to the employer; and (4) was unlawfully discriminated against because of her disability. See Willis v. Conopco, Inc., 108 F.3d 282, 283 (11th Cir. 1997).

Once a plaintiff establishes her prima *facie* case, the defendant's burden on rebuttal is to produce a legitimate, non-discriminatory reason for the challenged employment decision. See McDonnell Douglass Corp. v. Green, 93 S.Ct. 1817 (1973). This burden is merely one of production, not persuasion, and is exceedingly light. See Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1093 (1981). If the defendant satisfies this burden of production the plaintiff must establish, in order to prevail upon her claim, both that the proffered reason for the employment decision was false and that the real reason underlying the action was discriminatory in nature. See St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2751-52 (1993).

For the purpose of this appeal Continental concedes that Hightower has a disability. We conclude further that Hightower has presented sufficient evidence to preclude summary judgment against her on the question of whether she could, with reasonable accommodations, perform the essential requirements of the job and is therefore a qualified individual. The dispositive question is whether, on the undisputed facts, the employer's offer of part-time employment without additional compensation equal to the value of full fringe benefits was unreasonable.

Reasonable Accommodations

Under the ADA employers must provide reasonable accommodations which enable disabled employees to perform the essential requirements of their jobs. See Willis, 108 F.3d at 283. A reasonable accommodation includes:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, *part-time or modified*

> *work schedules*, reassignment to a vacant position, acquisition or modification of equipment or devices,...and other similar accommodation for individuals with disabilities.

42 U.SC. § 12111(9) (emphasis added).

An employer may be liable for "not making reasonable accommodations to known physical or mental limitations of an otherwise qualified individual with a disability." Schwertfager v. City of Boynton Beach, 42 F.Supp. 2d 1347, 1363 (SD. Fla. 1999)(citing 42 U.S.C. § 12112(b)(5)(A)); see also Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996). "The burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." Stewart v Happy Herman's Chesire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997). If the plaintiff fails to prove that the requested accommodation is reasonable, she fails to satisfy her *prima facie* case, and "on this basis, alone, the [defendant] is entitled to summary judgment." Quick v. Tripp, Scott, Conklin & Smith, P.A., 43 F.Supp. 2d 1357, 1369 (S.D Fla. 1999).

"The use of the word 'reasonable' as an adjective for the word 'accommodate' connotes that an employer is not required to accommodate an employee in any manner in which the employee desires." Earl v. Mervyns. Inc. 207 F.3d 1361, 1367 (11th Cir. 2000); see also Mont-Ross, 111 F.Supp. 2d 1338, 1358 (S.D. Fla. 2000) (citing Schwertfager, 42 F.Supp. 2d at 1363) ("An employee is not entitled to [his] preferred accommodation, only one that is reasonable.")

In Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998), the plaintiff, a reservations sales agent, suffered from carpal tunnel syndrome. As an accommodation she requested a reduced work schedule varying from four to six hour days. Under the defendant-employer's salary continuance program, which paid the difference between worker's compensation benefits and the employee's full-time salary, the plaintiff continued to receive her full-time salary while she took a medical leave of absence to convalesce from surgery. Once the plaintiff resumed working, however, she was compensated only for the part-time hours actually worked. The plaintiff was placed on unpaid medical leave after she exceeded the defendant's sixty-day limit allowing injured employees to work reduced schedules (e.g., fewer hours than the employee's scheduled shift).

In an ADA lawsuit filed against her employer the plaintiff alleged that the defendant failed to reasonably accommodate her when it placed her on unpaid medical leave instead of continuing her part-time status. This Court affirmed the district court's holding that employers do not have a duty to place disabled employees in part-time positions where none exist and that there is no duty to create such positions. See id. at 625.

In Duckctt v. Dunlop Tire Co., 120 F.3d 1222 (11th Cir. 1997), a case factually similar to Terrell, a Section Manager missed several months from work after being diagnosed with elevated high blood pressure. During his absence the employer enrolled him in its salary continuation program which provided for maximum benefits for a period of up to twenty-four (24) weeks and lesser benefits for a period of twenty-eight (28) weeks. The employee was terminated approximately five (5) months later, while still in the salary continuation program, after several of his treating

physicians opined that he still could not function as Section Manager due to his disability.

The employee brought an ADA claim against his employer asserting that the employer failed to reasonably accommodate him under the Act because he was terminated with two (2) months of benefits remaining under the employer's salary continuation program. This Court affirmed the grant of summary judgment in favor of the employer and stated "[t]hat [d]efendant, as a matter of business policy, chose to create its Salary Continuation Plan does not establish that it was required to allow [p]laintiff to receive benefits under the plan-for an entire year-as a reasonable accommodation under the ADA." Duckett, 120 F.3d at 1225.

While part-time employment is frequently used to accommodate the special needs of disabled employees, in Duckett this Court rejected the notion that employees are entitled to be enrolled in their employers' fringe benefits programs as an ADA accommodation. There is no legal support for Hightower's contention that, as a part-time employee she was entitled to the same fringe benefits given to full-time employees.

The accommodation offered, a reduced work schedule of 25-29 hours per week, was reasonable. The ADA, 42 U.S.C. § 12111(9)), provides that "part-time or modified work schedules" are reasonable accommodations, exactly what Hightower's physician opined would be reasonable. The accommodation requested by Hightower, extra compensation equal to the value of full fringe benefits while working reduced hours, was not reasonable.

III. CONCLUSION

The part-time position offered by Continental, and rejected by Hightower, was a reasonable accommodation. Hightower's requested accommodation was not. For these reasons, she failed to present a *prima facie* case of ADA discrimination. Summary judgment for the employer is **AFFIRMED**.[1]

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
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[1] Because Hightower failed to establish a *prima facie* case of ADA discrimination the burden never shifted to Continental to articulate a legitimate, non-discriminatory reason for its employment decisions. See McDonnell Douglass Corp. v. Green, 93 S.Ct. 1817 (1973). Nevertheless it is undisputed that the plaintiff was absent excessively because of a disability. It is also unnecessary to address Hightower's retaliation claim because she failed to establish a *prima facie* case of retaliation, i.e., a causal relationship between protected expression (i.e. request for ADA accommodations) and the adverse employment action. See Holifield v. Reno, 115 F.3d 1555,1566 (11th Cir. 1997).

Appendix B

UNITED STATES DISTICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARY ELEIZABETH HIGHTOWER,

Plaintiff,

v. Case No.: 97-348-CIV-J-20C

CONTINENTAL CABLEVISION
OF JACKSONVILLE, INC.,

Defendant.

ORDER

Before the Court are Plaintiff's Motion for Partial Summary Judgment (Doc. No. 20, filed January 12. 1998), to which Defendant responded on January 29, 1998, see Doc. No. 33, and Defendant's Motion for Summary Judgment (Doc. No. 33, filed January 29, 1998), to which Plaintiff responded on February 9, 1998. See Doc. No. 43. Thereafter Defendant filed its Motion for Leave to Reply to Plaintiff's Response (Doc. No. 51, filed March 3, 1998), to which Plaintiff responded on March 17, 1998. See Doc. No. 55. Defendant's Motion For Leave (Doc. No. 51) is **DENIED.**

In her two count Complaint, Plaintiff alleges that Defendant violated the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C.A. § 12101 et seq., by terminating her employment as a result of her disability and failing to provide her with a reasonable accommodation. Plaintiff further alleges that Defendant retaliated against her as a result of her request for reasonable accommodations by terminating

her and by opposing her request for unemployment compensation.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Clark v. Coats & Clark. Inc., 929 F.2d 604, 608 (11th Cir. 1991). When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, 987 F.2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir 1988). It

must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving parry." Id. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

Defendant argues that Plaintiff cannot establish a violation of the ADA because she has presented no direct evidence of discrimination and cannot establish a prima facie case of discrimination. With respect to the latter argument, Defendant argues that Plaintiff is not disabled because her alleged disease was controlled by medication and she is not substantially limited in a major life activity. Defendant further argues that Plaintiff was excessively absent and, therefore, is not otherwise qualified for her position at Continental, and that Plaintiff has failed to show that Continental's articulated reason for discharge is pretextual. Defendant also seeks summary judgment on the ADA claim because it provided Plaintiff with several accommodations and. is not required to either create a position or provide her with her requested accommodation, particularly if such requested accommodation is unreasonable.

Having reviewed the affidavits and deposition transcripts submitted in support of Defendant's motion for summary judgment and the materials submitted in opposition to that motion, and having considered the parties' arguments, the Court concludes that Defendant is entitled to summary judgment in its favor. Turning first to her ADA claim, Plaintiff has not come forward with evidence sufficient to

raise a genuine issue for trial with respect to whether she can make a prima facie case under the ADA. "To state a prima facie case of disability discrimination, a plaintiff must show (1) that she has a disability; (2) that, with or without reasonable accommodations, she can perform the essential functions of the position she holds; and (3) that she was discriminated against because of her disability." Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998). Defendant has submitted evidence demonstrating that attendance is an essential function of the customer service representative's job, see Affidavit of Gloria Davis (attached to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendant's Memorandum") (Doc. No. 34, filed January 29, 1998) as Exhibit 1)[2] at ¶ 3; Defendant has also submitted evidence establishing that Plaintiff was reprimanded on several occasions for her absenteeism. See Deposition Transcript of Plaintiff Mary Elizabeth Hightower ("Plaintiff's Tr.") (Doc. No. 26, filed January 12, 1998) at pp. 135, 168-173; Pl. Tr., Def's. Exh. 10. Numerous cases stand for the proposition that when attendance is an essential function of a job, and when the employee's attendance is unreliable and/or sporadic, that employee cannot subsequently prevail on a claim under the

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[2] It is irrelevant that Davis' "Affidavit" was not notarized, as this statement was properly made in accordance with 28 U.S.C. § 1746. See 28 U.S.C. § 1746; United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in State of Alabama, 941 F.2d 1428, 1444 n. 36 (11th Cir. 1991); Lewis v. Zilog, Inc, 908 F. Supp. 931, 958-59 (N.D. Ga. 1995); Carter v. Clark, 616 F.2d 228 (5th Cir. 1980) (striking down local rule which required that all pleadings of prison inmates be notarized because such rule was in conflict with section 1746); Duncan v. Foti, 828 F.2d 297, 297 (5th Cir. 1987) ("28 U.S.C. § 1746 provides an alternative to notarization").

ADA because she is not an otherwise qualified individual. See Jackson v. Veterans Affairs, 22 F.3d 277, 279 (11th Cir.), cert. dismissed, 513 U.S. 1052 (1994); Halperin v. Abacus Technology Corp, 128 F.3d 191, 197-98 (4th Cir. 1997); Bultemeyer v Fort Wayne Community Schools, 100 F.3d 1281, 1284 (7th Cir. 1996); Martinez v. Lennox International, Inc., 1997 WL 209306, *4 (N.D. Tex. Apr. 18, 1997); Tyndall v. National Education Center, 31 F.3d 209, 213-14 (4th Cir. 1996); Defendant's Memorandum (Doc. No. 34) at p. 10 (citing additional cases). Plaintiff's arguments in response are unpersuasive. Plaintiff has submitted no evidence to show that attendance was not an essential function of her job or that she did not have an attendance problem. Further, on the record before the Court, a reasonable jury could not find Defendant's proffered reason to be a pretext.

In addition, the evidence is clear that Defendant did offer Plaintiff a reasonable accommodation when it offered her a part time position. Plaintiff's argument that the position is not a reasonable accommodation because she would not have received full time benefits is without merit. See Willett v. State of Kansas, 942 F. Supp. 1387, 1395 (D. Kan. 1996), aff'd, 120 F.3d 272 (10th Cir. 1997); Pattison v. Meijer, Inc., 897 F. Supp. 1002, 1008 (W.D. Mich. 1995). There is no duty on the part of Defendant to create a position for Plaintiff. See Terrell, 132 F.3d at 626; Chiari v. City of League City, 920 F.2d 311, 318 (5th Cr. 1991). Once Defendant offered Plaintiff the reasonable accommodation of a part time job and it was rejected, Defendant discharged its duty to further accommodate Plaintiff and Plaintiff can not demonstrate that she was otherwise qualified. See, e.g., Schmidt v. Methodist Hospital of Indiana, Inc., 89 F.3d 342, 344-45 (7th Cir. 1996); Willet, 942 F.Supp. at 1395; cf.. 29 CF.R. § 1630.9(d) (stating that employee is no longer considered to be "a qualified individual with a disability" if

that employee refuses to accept a reasonable accommodation and thereafter cannot perform essential functions of the job). Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's ADA claim.[3]

Defendant also argues that Plaintiff cannot establish a claim for retaliation in Count II. To prevail on a claim of retaliation, Plaintiff must establish that she was engaged in a statutorily protected activity, that the employer has taken an adverse employment action against her, and that a causal connection exists between the two. See Fleming v. Boeing Co., 120 F.3d 242, 248 (11th Cir. 1997). With respect to Plaintiff's claim that Defendant retaliated against her when it appealed her receipt of unemployment benefits, the Court agrees with United States District Judge Forrester of the Northern District of Georgia who held that a Defendant's opposition to unemployment benefits is not retaliatory in nature and not a basis for a Title VII retaliation claim. See Baker v. Summit Unlimited, Inc., 855 F. Supp. 375, 376 (N.D. Ga. 1994). Further, Plaintiff cannot make the argument that she was terminated for failure to sign a release. The offer of the release to Plaintiff was part of a severance package. Obviously Plaintiff was going to be leaving Defendant whether she accepted the severance package or not. Finally, Plaintiff has submitted no evidence that Defendant terminated her employment as a result of her request for reasonable accommodations. Rather, the unrebutted evidence -- as discussed above -- shows that Plaintiff was terminated because of her absenteeism. See Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1994) (burden of proof in retaliation cases under Title VII Is governed by the same framework as McDonnell Douglas Corp. v. Green, 411

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[3] In light of this decision, the Court need not decide whether Plaintiff is disabled under the ADA.

U.S. 792 (1973); thus, even if Plaintiff makes a prima facie case, she must then come forward with evidence sufficient to show that Defendant's asserted reason for the termination is pretextual); Armstead v. City of St. Petersburg, 1997 WL 724420, at *5 (M.D. Fla.. Nov. 13, 1997). Accordingly, Defendant is entitled to judgment as to Count II of Plaintiff's Complaint as well.[4]

In accordance with the foregoing, it is **ORDERED AND ADJUDGED** that:

(1) Plaintiff's Motion for Partial Summary Judgment (Doc No. 20) is **DENIED**;

(2) Defendant's Motion for Summary Judgment (Doc. No. 33) is **GRANTED**;

(3) The Clerk shall enter judgment in favor of the Defendant and against the Plaintiff; and

(4) The Clerk is directed to close the file.

DONE AND ENTERED at Jacksonville, Florida this 2nd day of April, 1998.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Robert J. Winicki, Esq.
David L. Gordon, Esq.
Garry Randolph, Courtroom Deputy
Law Clerk

---

[4] In light of the foregoing, the Court need not reach the issues of front-pay or punitive damages.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2695-FF

MARY ELEIZABETH HIGTOWER,

Plaintiff-Appellant,

versus

CONTINENTAL CABLEVISION OF JACKSONVILLE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: MARCUS and HILL, Circuit Judges and FERGUSON*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

*Honorable Wilkie D. Ferguson, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
APR 10 2001
THOMAS K. KAHN CLERK

Appendix D

UNITED STATES DISTICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARY ELIZABETH HIGHTOWER,

Plaintiff,

JUDGMENT IN A CIVIL CASE

v. Case Number: 97-348-CIV-J-20C

CONTINENTAL CABLEVISION
OF JACKSONVILLE, INC,

Defendant.

X **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order entered on April 2, 1998, judgment is entered in favor of the Defendant, Continental Cablevision of Jacksonville, Inc., and against the Plaintiff, Mary Elizabeth Hightower.

Richard D. Sletten
Clerk

Date: April 2, 1998

/s/ Sharon Sholders
(By) Deputy Clerk

FILED
AUG 6 2001
OFFICE OF THE CLERK

No. 01-33

IN THE
Supreme Court of the United States

MARY ELIZABETH HIGHTOWER,
Petitioner,

v.

CONTINENTAL CABLEVISION OF JACKSONVILLE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, on the undisputed facts, Respondent Continental Cablevision of Jacksonville's offer of part-time employment without additional compensation equal to the value of full fringe benefits to Petitioner Mary Hightower was unreasonable?

CORPORATE DISCLOSURE STATEMENT

Continental Cablevision of Jacksonville, Inc., became MediaOne of Greater Florida, Inc., which is wholly owned by MediaOne of Delaware, Inc. MediaOne of Delaware, Inc. is a wholly owned subsidiary of MediaOne of Colorado, Inc. MediaOne of Colorado, Inc. is a wholly owned subsidiary of MediaOne Group, Inc. MediaOne Group, Inc. is a wholly owned subsidiary of AT&T Corporation. AT&T Corporation is a publicly traded corporation.

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IN THE

Supreme Court of the United States

No. 01-33

MARY ELIZABETH HIGHTOWER,
Petitioner,

v.

CONTINENTAL CABLEVISION OF JACKSONVILLE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's Question Presented and Statement of the Case include numerous conclusory allegations and misstatements or omissions of fact. As to the Question Presented, Petitioner proposes that the proper question before the Court is: "Whether as a matter of law an employer's offer of a part time position with reduced benefits to the disabled employee without engaging in any interactive process is a "reasonable accommodation" under the Americans with Disabilities Act, when the employee is a victim of multiple sclerosis, who was already working a full time position with full benefits and repeatedly requested only a reduction in hours?" Pet., at *i*. However, neither the Eleventh Circuit Court of Appeals nor the United States District Court for the Middle District of

Florida cited the "interactive process" issue as a basis for their respective decisions. Pet., App. A, and Pet., App. B. Thus, Petitioner's contention in her Question Presented that Respondent failed to engage in any "interactive process" regarding her request for accommodation is a conclusory allegation and had no bearing in the two opinions below. Respondent submits that the more appropriate Question Presented is the one stated above by Respondent, involving Respondent's offer of part-time employment to Petitioner, which the Eleventh Circuit identified in its opinion as the "dispositive question" before the court. Pet., at App. A-6.

Further, Petitioner makes the conclusory allegation in her Statement of the Case that Respondent "never engaged in any interactive process with" Petitioner. Pet., at 3. Again, the "interactive process" issue played no role in the decisions below. In any event, the undisputed facts set forth in the Eleventh Circuit's decision should serve as the pertinent Statement of the Case. The Eleventh Circuit noted, among other things, the following undisputed facts: (1) that Petitioner requested an "accommodation of a five-day week, six-hour day work schedule (i.e. 30 hours per week) which, she contends, would permit her to retain full-time employment status without a loss of benefits;" (2) that Petitioner's physician gave his opinion regarding a reasonable accommodation for Petitioner in a letter to Respondent stating that "[i]t would be helpful if she could be reassigned to a part-time position;" (3) that in response to Petitioner's request, Respondent offered her "a 25-29 hour part-time position and further asserted that no full-time thirty (30) hour position with full benefits existed;" (4) that Petitioner "admitted that she was unaware of the existence of a part-time position which paid full-time benefits;" and (5) that Petitioner "presented no evidence . . . that employees who work less than forty-hours are provided full health care benefits." Pet., at App. A-3–A-4.

The Eleventh Circuit affirmed the district court's grant of summary judgment to Respondent. The Eleventh Circuit held: (1) that Respondent's offer of a part-time position was reasonable as the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), specifically provides that part-time or modified work schedules are reasonable accommodations and Petitioner's physician had opined that such an accommodation would be reasonable; (2) that Petitioner's requested accommodation of extra compensation equal to the value of full fringe benefits while working reduced hours was unreasonable; and (3) that once Petitioner rejected Respondent's offer of a reasonable accommodation, Respondent discharged its duty under the ADA and Petitioner could not demonstrate that she was otherwise qualified. Pet., at App. A-6–A-9.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE ISSUE BEFORE THE COURT IN *US AIRWAYS, INC. V. BARNETT,* IS INAPPLICABLE TO THE INSTANT CASE.

Petitioner's main argument in support of the petition is that the Court granted certiorari in *US Airways v. Barnett*, Docket Number 00-1250, on appeal from *Barnett v. US Airways, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), and therefore it should grant certiorari here. In support of her argument, Petitioner states that the Court granted certiorari in *Barnett* on the issue "of whether an employer is required to assign a disabled employee to a different position as a 'reasonable accommodation' under the ADA." Pet., at 7. Petitioner further suggests that "[i]n all probability, the Court will be addressing the proper interpretation of 'reasonable accommodation' especially in light of EEOC regulations on the interactive process." Moreover, Petitioner also speculates that "[t]he Court may also address the evidentiary standard

for a jury determination on whether an accommodation is a 'reasonable accommodation.'" Pet., at 7.

Petitioner, however, has misstated the issue before the Court in *Barnett*. The Court granted certiorari in *Barnett* "limited to Question 1 presented by the petition." *US Airways, Inc. v. Barnett*, 121 S.Ct. 1600, 149 L.Ed.2d 467 (April 16, 2001). Question 1 presented by the petition in *Barnett* was:

> Whether, as the *en banc* Ninth Circuit held below, the ADA requires an employer to reassign a disabled employee to a different position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system, or whether, as other courts of appeals have held, the ADA's "reasonable accommodation" requirement does not compel an employer to disregard the rights of other employees under its seniority policy.

The instant case does not involve the issue of reassignment as a reasonable accommodation in light of an employer's bona fide seniority system. There is no seniority system at issue in the instant case. The issue raised by *Barnett*, whether a seniority system in essence "trumps" an employee's request for reassignment as a reasonable accommodation, is not implicated at all in the instant case.

Further, to the extent that the Court in *Barnett* will address the general issue of reassignment as a reasonable accommodation, *Barnett* is still inapplicable in the instant case. The instant case involves a reduction of hours as a reasonable accommodation rather than a reassignment to a different position. In essence, this case turns on whether Petitioner's request to work a reduced schedule while still receiving full time fringe benefits is a reasonable accommodation. To characterize such a request as a request for reassignment, rather than a reduction of hours, misapprehends the actual character of the proposed accommodation. The ADA itself recognizes

the fundamental difference between "part-time or modified work schedules" and "reassignment to a vacant position" as it separately delineates each alternative in the statutory definition of what a reasonable accommodation may include. 42 U.S.C. § 12111(9)(B). Thus, even if the Court will decide the issue of "reassignment" not specifically limited to the seniority system context, *Barnett* is still inapplicable to the instant case and the petition should be denied.

Moreover, Petitioner contends without basis that the Court will "in all probability" be addressing the issues of the "interactive process" and the "evidentiary standard for a jury determination on whether an accommodation is a 'reasonable accommodation.'" As stated above, the Court specifically limited its review of *Barnett* to the issue of "reassignment as a reasonable accommodation in light of a seniority system." It is not reviewing the other aspects of the Ninth Circuit's opinion. In fact, the second question presented by the Petition for Writ of Certiorari in *Barnett* involved a review of the Ninth Circuit's holding regarding "interactive process."[1] Thus, as the Court granted review only as to the first issue in the *Barnett* petition, and specifically did not grant review of the "interactive process" issue, the Court will most certainly not be addressing the proper interpretation of "reasonable accommodation" in the context of the "interactive process." Further, Respondent does not know the basis for the Petitioner's conclusion that the Court in *Barnett* "may" discuss the evidentiary standard for a jury determination as to reasonable accommodation. Respondent, however, suggests that the Court's granting of certiorari limited to Question 1 in *Barnett* implies that such an issue is not before the Court.[2]

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[1] A copy of the questions presented from the petition in *Barnett*, retrieved from "Briefserve.com," is attached as Appendix A to this Brief.

[2] Even assuming *arguendo* that these issues were before the Court, which they clearly are not, such issues are not implicated in the instant case. As set forth in the Statement of the Case, neither the Eleventh

Because Petitioner's stated reason for the Court to grant certiorari in the instant case is the Court's pending review of *Barnett*, and *Barnett* is inapposite, the Court should deny the Petition for Writ of Certiorari.

II. THE INSTANT CASE DOES NOT PRESENT A CONFLICT BETWEEN THE CIRCUITS OR AN IMPORTANT FEDERAL QUESTION.

Rule 10 of the Rules of the Supreme Court of the United States lists certain compelling reasons why the Court grants writs of certiorari. Two of the main reasons are that a decision of a United States court of appeals is in conflict with other United States courts of appeals on the same important matter, or that "a United States court of appeals has decided an important federal question that has not been, but should be, settled by" the Court, or "has decided an important federal question in a way that conflicts with relevant decisions" of the Court. None of these compelling reasons is present in the instant case. Moreover, none of the cases cited by Petitioner illustrate a conflict between other circuits and the Eleventh Circuit's decision in the instant case.

Circuit nor the district court relied on the "interactive process" issue when deciding the case below. Further, the evidentiary standard necessary for a jury determination as to a reasonable accommodation is of little import as both lower courts determined, *on the undisputed facts*, that Petitioner's requested accommodation was unreasonable as a matter of law, and that Respondent's offered accommodation was reasonable as a matter of law. Thus, while Petitioner cites the Court's decision in *PGA Tour, Inc. v. Martin*, 121 S.Ct. 1879, 149 L.Ed 2d 904 (May 29, 2001), for the proposition that "an individualized inquiry" must be made regarding a reasonable accommodation, such an inquiry was made by the lower courts on the undisputed facts of the instant case. Pet., at 7.

A. There is no conflict among the circuits regarding the Eleventh Circuit's decision below.

As stated above, the Eleventh Circuit held that the accommodation requested by Petitioner, extra compensation equal to the value of full-time fringe benefits while working reduced hours, was not reasonable. Petitioner has cited no case, and Respondent is aware of no case, from another United States court of appeals in conflict with this holding.

Further, the Eleventh Circuit held that the part-time job with part-time benefits offered by Respondent was a reasonable accommodation on the undisputed facts of the case. Petitioner has cited no case, and Respondent is aware of no case, from another United States court of appeals in conflict with this holding.

Moreover, Petitioner has cited no case, and Respondent is aware of no case, from a United States court of appeals in conflict with the Eleventh Circuit's reasoning that "employers do not have a duty to place disabled employees in part-time positions where none exist and that there is no duty to create such positions." Pet., at App. A-8, citing *Terrell v. US Air*, 132 F.3d 621, 625 (11th Cir. 1998). In short, Petitioner has not cited a conflict among the circuits regarding any aspects of the sound legal reasoning employed by the Eleventh Circuit or the district court in the instant case.

B. The Eleventh Circuit did not decide an important federal question that should be decided by the Court or that is in conflict with previous decisions of the Court.

The courts below, on the undisputed facts, applied well-established law and found that Respondent had offered Petitioner a reasonable accommodation. Further, the courts below, on the undisputed facts, applied well-established law and found the Petitioner's requested accommodation was

unreasonable. Based on these findings, Petitioner "failed to present a *prima facie* case of ADA discrimination." Pet., at App. A-10.

It is also notable that the Eleventh Circuit's opinion below was an unpublished, *per curiam* opinion. If this case was of great public importance, or decided an important federal question, it is unlikely that the Eleventh Circuit's opinion would be unpublished.

Further, Rule 10 of the Rules of the Supreme Court of the United States notes that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Although Petitioner does not specifically assert these reasons in justifying her petition, in essence, Petitioner argues that the Eleventh Circuit relied on erroneous factual findings and the misapplication of properly stated law. Such reasons, assuming *arguendo* they existed, do not justify the Court granting the petition.

C. The Eleventh Circuit's decision is not in conflict with any cases cited in the Petition.

Although Petitioner does not specifically assert in her petition that the Eleventh Circuit's decision in the instant case is in conflict with the decisions of other circuits, Petitioner does cite two cases regarding reassignment that she contends are applicable to the instant case.

Petitioner cites *Norville v. Staten Island University Hosp.*, 196 F.3d 89 (2d Cir. 1999), for the proposition that "[r]eassignment does not constitute reasonable accommodation . . . where a position comparable to the employee's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority or other advantages in her former job." Pet., at 8, citing *Norville*, 196 F.3d at 99. Initially, as stated above, the instant case involves a reduction

of work hours and not a reassignment of positions. Therefore, on a basic level, *Norville* is inapposite. Further, unlike *Norville* where there was evidence of an equivalent open position, in the instant case there was no available position comparable to the one Petitioner sought. In fact, the Eleventh Circuit specifically found that Petitioner presented no evidence of any employees who work less than a full schedule and are provided full benefits, and that Petitioner admitted that she was unaware of a part-time position which paid full-time benefits. Moreover, Respondent offered Petitioner the very accommodation, a part-time position, that her doctor suggested would be reasonable. Thus, to the extent that Petitioner's citation to *Norville* raises the inference that *Norville* is in conflict with the Eleventh Circuit's decision below, such inference is incorrect.

Petitioner next cites *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719 (6th Cir. 2000), for the proposition that an employee's "refusal to accept one of the lower graded positions [offered as an accommodation] does not automatically preclude her from being considered a 'qualified individual with a disability.'" Pet., at 8-9, citing *Hoskins*, 227 F.3d at 728, n.3. The *Hoskins* court further stated, citing *Norville*, that if the employee could "demonstrate that an equivalent position was open, for which she was otherwise qualified, then she [would] prevail on her claim." *Hoskins*, 227 F.3d at 728, n.3. *Hoskins* is distinguishable from the instant case for the same reasons *Norville* is distinguishable. First, *Hoskins* involved a reassignment rather than a reduction of hours. Further, *Hoskins* specifically states that the employee could prevail if she shows an open position for which she was otherwise qualified. In the instant case, Petitioner has provided no evidence of such an open position. Finally, while *Hoskins* does stand for the proposition cited, the ultimate holding of *Hoskins* was to affirm summary judgment in favor of the employer on the plaintiff's ADA claim. The court held specifically that the plaintiff's request

to be permanently placed in a position that was a "rotating-type" job "would essentially require the creation of a new position rather than reassignment to an otherwise existing vacant one." *Hoskins*, 227 F.3d at 730. Thus, the plaintiff did not meet "her burden of showing that her proposed accommodation [was] a reasonable one." *Id.*

Likewise, in the instant case, Petitioner did not meet her burden that her proposed accommodation was a reasonable one. The Eleventh Circuit held that "[t]here is no legal support for [Petitioner's] contention that, as a part-time employee she was entitled to the same fringe benefits given to full-time employees." Pet., at App. A-9. The Eleventh Circuit is correct. There is no such authority and *Norville* and *Hoskins* do not provide Petitioner with such authority. Therefore, Petitioner has not brought forth, even through inference, any case that is in conflict with the decision of the Eleventh Circuit.

Petitioner has failed to demonstrate a conflict between the Eleventh Circuit's opinion and the decision of any other United States court of appeals. Further, Petitioner has failed to demonstrate that the instant case involves an important federal question. As Petitioner has failed to show any compelling reason for review, the Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, and because the petition fails to demonstrate any valid ground for review of the decision below, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

[Filed Feb. 1, 2001]

No. 00-___

IN THE
SUPREME COURT OF THE UNITED STATES

US AIRWAYS, INC.
Petitioner,

v.

ROBERT BARNETT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Americans with Disabilities Act ("ADA") prohibits covered employers from "discriminating" in the terms and conditions of employment, and defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee." 42 U.S.C. § 12112(b)(5)(A). The questions presented in this petition are:

1. Whether, as the *en banc* Ninth Circuit held below, the ADA requires an employer to reassign a disabled employee to a different position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system, or whether, as other courts of appeals have held, the ADA's "reasonable accommodation" requirement does not compel an employer to disregard the rights of other employees under its seniority policy.

2. Whether, as the *en banc* Ninth Circuit held below, evidence of an employer's failure to engage in an interactive process with a disabled employee to identify reasonable accommodations precludes the employer from obtaining summary judgment in an ADA action, or whether, as other courts of appeal have held, any failure on the part of the employer to engage in such an interactive process is of no legal consequence in determining whether the employer violated the ADA.

Respectfully submitted,

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